

1 HONORABLE JAMES L. ROBART  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 MICROSOFT CORPORATION,

10 Plaintiff,

11 v.

12 MOTOROLA INC., et al.,

13 Defendants.

14 MOTOROLA MOBILITY, LLC, et al.,

15 Plaintiffs,

16 v.

17 MICROSOFT CORPORATION,

18 Defendant.

19 Case No. C10-1823-JLR

20 AGREED MOTION TO SEAL  
21 PORTIONS OF APRIL 19, 2013 ORDER  
22 AND DEPOSITION DESIGNATIONS

23 **Noted:** Thursday, April 25, 2013

24 **Hearing:** Friday, April 26, 2013, 9:00 am

25 Plaintiff Microsoft Corporation (“Microsoft”), and defendants Motorola, Inc., Motorola  
26 Mobility LLC (formerly Motorola Mobility, Inc.) and General Instrument Corporation  
27 (“Motorola”), by and through their counsel below, hereby submit this Agreed Motion to Seal in  
28 accordance with the Court’s Order, dated April 19, 2013 (the “Order”) (Dkt. 672).

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## I. INTRODUCTION

The Court's Order directed the Parties to file (1) a proposed joint redacted version of the court's Findings and Conclusions and (2) a proposed joint redacted version of the parties' deposition designations. Accordingly, along with this Agreed Motion, the Parties are filing under seal the following Exhibits:

- Exhibit 1A is the Parties' proposed redacted version of the Court's April 19, 2013 Findings and Conclusions. Exhibit 1B is identical, except that the redactions proposed by Microsoft are highlighted in green and those proposed by Motorola are highlighted in orange.
  - Exhibits 2A, 3A and 4A are, respectively, the Parties' proposed redacted versions of the deposition designations of Leo Del Castillo, Albert Penello, and Timothy Kowalski. Exhibits 2B, 3B, and 4B are identical, except that the redactions proposed by the parties remain viewable and appear in a red box.
  - Exhibit 5 consists of a complete set of the remaining deposition designations from which all *non-designated* portions have been removed, leaving only the designated portions that may have been submitted by the Parties as relevant evidence.<sup>1</sup>

The color-coded highlighting of the Parties' respective proposed redactions in Exhibits 1B, 2B, 3B, and 4B is provided for the Court's convenience only. Neither Party opposes the other Party's proposed redactions.

## II. LEGAL AUTHORITY & ARGUMENT

## A. Legal Standard.

A party seeking to seal a judicial record attached to a dispositive motion or presented at trial must articulate “compelling reasons” that outweigh the public policies favoring disclosure. *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). “In general, ‘compelling reasons’ . . . exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to . . . release trade secrets.” *Id.*, at 1179 (citing *Nixon v.*

<sup>1</sup> Consistent with separate communication with the Court, the Parties understand that the Court does not intend to publicly release non-designated portions of any deposition transcripts that were not introduced as evidence at trial and are not referenced in the Court's Findings and Conclusions. Non-designated portions also have been removed from Exhibits 2, 3 and 4.

1 *Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)). The Ninth Circuit has adopted the  
 2 Restatement's definition of "trade secret." *See Ultimate Timing, L.L.C. v. Simms*, 2010 WL  
 3 786021, at \*1-2 (W.D. Wash. Mar. 4, 2010) (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th  
 4 Cir. 1972)). Under that standard, a "trade secret may consist of any formula, pattern, device or  
 5 compilation of information which is used in one's business, and which gives him an opportunity  
 6 to obtain an advantage over competitors who do not know or use it." *Id.*, 2010 WL 786021, at  
 7 \*2 (quotations omitted).

8       In accordance with Local Civil Rule 5(g)(3)(A), undersigned counsel for the Parties  
 9 certify that, on April 24 and 25, Ellen Robbins (for Microsoft) and Samuel Brenner (for  
 10 Motorola) met and conferred, both telephonically and via email, regarding the need for, and  
 11 extent of, the proposed redactions that appear on Exhibits 1, 2, 3 and 4.

12 **B. Microsoft: Compelling Reasons Exist to Seal Information Disclosing Trade Secrets  
 13 Relating to the Next Generation of Microsoft's Xbox Game Console.**

14       Microsoft has proposed redactions only for those limited portions of the Court's  
 15 Findings and Conclusions (Ex. 1) and the deposition designations of Mr. Del Castillo (Ex. 2) and  
 16 Mr. Penello (Ex. 3) that disclose Microsoft's trade secret information relating to the yet-to-be-  
 17 released next generation Xbox game console. The limited redactions proposed by Microsoft are  
 18 highlighted in green on Exhibit 1B and identified with a red box in Exhibits 2B and 3B. These  
 19 selections are fully redacted in the corresponding versions that the Parties have agreed may be  
 20 publicly disclosed (Exs. 1A, 2A and 3A).

21       Exhibits 1, 2 and 3 disclose highly sensitive product development and marketing plans  
 22 for Microsoft's next generation Xbox game console; information that was protected from public  
 23 disclosure during the course of trial. Compelling reasons exist to maintain this information  
 24 under seal.

25       Prior to trial, Microsoft filed a Motion to Seal certain exhibits, including a number that  
 disclosed trade secrets relating to the next generation Xbox console (Dkt. 510). The Motion was

1 supported by the declaration of Mr. Del Castillo (Dkt. 514) (the “Del Castillo Decl.”).  
 2 Microsoft’s request was granted and, at trial, the courtroom was closed during relevant portions  
 3 of Mr. Del Castillo’s testimony.

4 As explained in Mr. Del Castillo’s declaration, this information is not generally known to  
 5 the public or Microsoft’s competitors. Del Castillo Decl., ¶ 3. Microsoft takes pains to ensure  
 6 that information regarding Microsoft’s strategic objectives, feature descriptions and development  
 7 and marketing timelines remain confidential and protected against unauthorized disclosure,  
 8 including by disclosing such information only under appropriate non-disclosure agreements  
 9 and/or the terms of a Protective Order. *Id.* Microsoft also restricts internal access to such  
 10 information. *Id.*

11 Public disclosure of the trade secret information discussed in Exhibits 1, 2 and 3 would  
 12 cause competitive harm to Microsoft. *Id.*, ¶ 5. Microsoft seeks to differentiate its Xbox and  
 13 Windows products and services from those of its competitors, providing its customers with a  
 14 higher quality product, exclusive features and a superior user experience. *Id.* Microsoft invests  
 15 heavily in its efforts to achieve these goals, and expends significant time, effort and resources  
 16 developing its product and marketing plans to reach these objectives and maintain or increase  
 17 market share. *Id.*

18 Accordingly, Microsoft submits that compelling reasons exist to maintain under seal the  
 19 strategic planning and marketing information relating to Microsoft’s next generation Xbox game  
 20 console described in Exhibits 1, 2 and 3.<sup>2</sup>

21 <sup>2</sup> See, e.g., *DISH Network, L.L.C. v. Sonicview USA, Inc.*, 2009 WL 2579052, at \*1 (S.D. Cal. Aug. 20, 2009)  
 22 (sealing documents containing “descriptions of Defendants’ products [that] could serve as a blueprint for others to  
 23 design similar products to circumvent DISH Network’s security system enabling more individuals to steal DISH  
 24 Network programming”); *TriQuint Semiconductor*, 2011 WL 6182346, at \*3 (finding “compelling reasons” to seal  
 25 where competitive standing would be harmed if competitors obtain information regarding business strategies,  
 including “development spending, budgets, and development processes” because disclosure would significantly  
 harm competitive standing by allowing “competitors to tailor their own capital expenditures, budgets, and business  
 strategies to compete against TriQuint more effectively”); *Krieger v. Atheros Communications, Inc.*, 2011 WL  
 2550831, \*1 (N.D. Cal. June 25, 2011) (sealing document containing “long-term financial projections, discussions  
 of business strategy, and competitive analyses.”); *Bauer Bros. LLC v. Nike, Inc.*, 2012 WL 1899838, \*3 (S.D. Cal.  
 May 24, 2012) (sealing documents containing confidential sales and advertising data and including a detailed  
 discussion of “sales, merchandise costs, costs of goods sold, royalty costs, promotional costs, and personnel costs.”).

**C. Motorola: Compelling Reasons Exist To Redact Information that Discloses Motorola Licensing Pricing Terms and Royalty Rates.**

As Motorola stated in its October 29, 2012 Motion to Seal (Dkt. 495 at 9-11), the confidential terms of license agreements constitute trade secrets within the Ninth Circuit's definition. *See, e.g., In re Elec. Arts, Inc.*, 298 F. App'x 568, 569-70 (9th Cir. 2008); *see also TriQuint Semiconductor v. Avago Techs., Ltd.*, No. CV 09-1531-PHX-JAT, 2011 WL 6182346, at \*3-7 (D. Ariz. Dec. 13, 2011) (sealing documents containing sensitive financial information and licensing information); *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 11-6121 CW, 2012 WL 3283420, at \*9 (N.D. Cal. Aug. 10, 2012) (sealing details of license agreement). Motorola, along with numerous third parties, has submitted sworn declarations attesting to the highly confidential and sensitive nature of the licensing terms in question, and the competitive harm that would result from public disclosure of these highly confidential terms. *See, e.g.*, Dkt. 496 (declaration of Brian C. Blasius); Dkt. 551 at 4 (collecting third party declarations).

Commensurate with the Court’s orders of November 19, 2012, regarding the treatment of information concerning “pricing terms, royalty rates, and guaranteed minimum payment terms” in licensing agreements, there are compelling reasons to redact this information from both the Court’s Findings and Conclusions (Ex. 1) and the deposition of Timothy Kowalski (Ex. 4). As noted above, Motorola’s proposed redactions to these documents are highlighted in orange in Exhibit 1B and identified with a red box in Exhibit 4B. These selections have been fully redacted in the versions the Parties have agreed may be publicly disclosed, Exhibits 1A and 4A.

### III. CONCLUSION

For the foregoing reasons, the Parties respectfully request an order sealing those portions of Exhibits 1, 2, 3 and 4 identified by the Parties as disclosing confidential and trade secret information, and that only the redacted versions (Exhibits 1A, 2A, 3A and 4A) be made part of the public record. The Parties also request that only those deposition transcripts from which all non-designated portions have been removed (Exhibit 5) be made part of the public record.

1 DATED this 25th day of April, 2013.  
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4 CALFO HARRIGAN LEYH & EAKES LLP  
5  
6

7 By s/ Arthur W. Harrigan, Jr.  
8  
9

10 Arthur W. Harrigan, Jr., WSBA #1751  
11 Christopher Wion, WSBA #33207  
12 Shane P. Cramer, WSBA #35099  
13  
14

15 By s/ T. Andrew Culbert  
16  
17

18 T. Andrew Culbert  
19 David E. Killough  
20  
21

22 MICROSOFT CORPORATION  
23 1 Microsoft Way  
24 Redmond, WA 98052  
25 Phone: 425-882-8080  
Fax: 425-869-1327  
26  
27

28 David T. Pritikin  
29 Richard A. Cederoth  
30 Constantine L. Trela, Jr.  
31 William H. Baumgartner, Jr.  
32 Ellen S. Robbins  
33 Douglas I. Lewis  
34 David C. Giardina  
35 John W. McBride  
36 David Greenfield  
37  
38

39 SIDLEY AUSTIN LLP  
40 One South Dearborn  
41 Chicago, IL 60603  
42 Phone: 312-853-7000  
43 Fax: 312-853-7036  
44  
45

46 Carter G. Phillips  
47 Brian R. Nester  
48  
49

50 SIDLEY AUSTIN LLP  
51 1501 K Street NW  
52 Washington, DC 20005  
53 Telephone: 202-736-8000  
54 Fax: 202-736-8711  
55  
56

57 Counsel for Microsoft Corp.  
58  
59

## SUMMIT LAW GROUP PLLC

By s/ Ralph H. Palumbo

Ralph H. Palumbo, WSBA #04751

Philip S. McCune, WSBA #21081

*ralphp@summitlaw.com*

*philm@summitlaw.com*

By s/ Thomas V. Miller

Thomas V. Miller

MOTOROLA MOBILITY LLC

600 North U.S. Highway 45

Libertyville, IL 60048-1286 (847) 523-2162

Kathleen M. Sullivan

QUINN EMANUEL URQUHART & SULLIVAN, LLP

51 Madison Ave., 22<sup>nd</sup> Floor

New York, NY 10010

(212) 849-7000

Brian C. Cannon

QUINN EMANUEL URQUHART & SULLIVAN, LLP

555 Twin Dolphin Drive, 5<sup>th</sup> Floor

Redwood Shores, CA 94065

(650) 801-5000

William C. Price

QUINN EMANUEL URQUHART & SULLIVAN, LLP

865 S. Figueroa Street, 10<sup>th</sup> Floor

Los Angeles, CA 90017

(213) 443-3000

Counsel for Motorola Solutions, Inc., Motorola Mobility LLC  
General Instrument Corp.

AGREED MOTION TO SEAL PORTIONS OF  
APRIL 19, 2013 ORDER AND DEPOSITION  
DESIGNATIONS - 7  
C10-1823-JLR

LAW OFFICES  
**CALFO HARRIGAN LEYH & EAKES LLP**  
999 THIRD AVENUE, SUITE 4400  
SEATTLE, WASHINGTON 98104  
TEL. (206) 623-1700 FAX. (206) 623-8717

## CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
  2. On the 25th day of April, 2013, I caused the preceding document to be served on counsel of record in the following manner:

Ralph Palumbo, WSBA #04751  
Philip S. McCune, WSBA #21081  
Summit Law Group  
315 Fifth Ave. South, Suite 1000  
Seattle, WA 98104-2682  
Telephone: 206-676-7000  
Email: [Summit1823@summitlaw.com](mailto:Summit1823@summitlaw.com)

Messenger  
 US Mail  
 Facsimile

Steven Pepe (*pro hac vice*)  
Jesse J. Jenner (*pro hac vice*)  
Ropes & Gray LLP  
1211 Avenue of the Americas  
New York, NY 10036-8704  
Telephone: (212) 596-9046  
Email: [steven.pepe@ropesgray.com](mailto:steven.pepe@ropesgray.com)  
Email: [jesse.jenner@ropesgray.com](mailto:jesse.jenner@ropesgray.com)

\_\_\_\_\_ Messenger  
\_\_\_\_\_ US Mail  
\_\_\_\_\_ Facsimile  
X Email

Norman H. Beamer (*pro hac vice*)  
Ropes & Gray LLP  
1900 University Avenue, 6<sup>th</sup> Floor  
East Palo Alto, CA 94303-2284  
Telephone: (650) 617-4030  
Email: [norman.beamer@ropesgray.com](mailto:norman.beamer@ropesgray.com)

Messenger  
 US Mail  
 Facsimile  
 X Email

Paul M. Schoenhard (*pro hac vice*)  
Ropes & Gray LLP  
One Metro Center  
700 12<sup>th</sup> Street NW, Suite 900  
Washington, DC 20005-3948  
Telephone: (202) 508-4693  
Email: [Paul.schoenhard@ropesgray.com](mailto:Paul.schoenhard@ropesgray.com)

\_\_\_\_\_ Messenger  
\_\_\_\_\_ US Mail  
\_\_\_\_\_ Facsimile  
X Email

1 Andrea Pallios Roberts (*pro hac vice*)  
2 Quinn Emanuel Urquhart & Sullivan, LLP  
3 555 Twin Dolphin Drive, 5<sup>th</sup> Floor  
4 Redwood Shores, CA 94065  
Telephone: (650) 801-5000  
Email: [andreasroberts@quinnemanuel.com](mailto:andreasroberts@quinnemanuel.com)

Messenger  
 US Mail  
 Facsimile  
 Email

5 Brian C Cannon (*pro hac vice*)  
6 Quinn Emanuel Urquhart & Sullivan, LLP  
7 555 Twin Dolphin Drive, 5<sup>th</sup> Floor  
8 Redwood Shores, CA 94065  
Telephone: (650) 801-5000  
Email: [briancannon@quinnemanuel.com](mailto:briancannon@quinnemanuel.com)

Messenger  
 US Mail  
 Facsimile  
 Email

9 Kathleen M. Sullivan (*pro hac vice*)  
10 Quinn Emanuel Urquhart & Sullivan, LLP  
11 51 Madison Ave., 22<sup>nd</sup> Floor  
12 New York, NY 10010  
Telephone: (212) 849-7000  
Email: [kathleensullivan@quinnemanuel.com](mailto:kathleensullivan@quinnemanuel.com)

Messenger  
 US Mail  
 Facsimile  
 Email

13 William Price (*pro hac vice*)  
14 Quinn Emanuel Urquhart & Sullivan, LLP  
15 865 S. Figuera St., 10th Floor  
16 LOS ANGELES, CA 90017  
Telephone: 213-443-3000  
Email: [williamprice@quinnemanuel.com](mailto:williamprice@quinnemanuel.com)

Messenger  
 US Mail  
 Facsimile  
 Email

17 DATED this 25th day of April, 2013.

18 /s/ Florine Fujita  
19 Florine Fujita